

DATE: May 9, 1995

CASE NO.: 93-INA-00296

In the Matter of:

DECOMA INDUSTRIES,  
Employer

On Behalf of:

ALI HASSANZADEH,  
Alien

Appearance: Eric Avazian, Esq.  
For the Employer

Before: Huddleston, Vittone, and Wood  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

### DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On January 27, 1992, Decoma Industries ("Employer") filed an application for labor certification to enable Ali Hassanzadeh ("Alien") to fill the position of Construction Management Engineer (AF 53-54). The job duties for the position are:

Planning and directing construction projects as follows:

- 1) Estimate take off price and formulate budgets.
- 2) Formulate engineering programs and staff.
- 3) Procurement of materials and sub-contracts.
- 4) Prepare work progress and productivity reports.
- 5) Develop and implement Critical Path Method [sic] (CPM) for scheduling of construction phases.

25% of duties is supervision.

The sole requirement for the position is a Masters of Science Degree in Construction Management.

The CO issued a Notice of Findings on September 1, 1992 (AF 30-37), proposing to deny certification on the grounds that the Employer has offered a job opportunity with restrictive minimum requirements and that the Employer failed to show good-faith effort in recruiting qualified U.S. workers, rejecting them for unlawful reasons. Specifically, the CO found that because the Employer is requiring a Masters Degree in Construction Management and has not considered any alternatives and/or related occupations, otherwise qualified U.S. workers are precluded from the job opportunity. Additionally, in a July 22, 1992, statement, the Employer refers to U.S. applicants lacking a "bachelor's degree or the required experience or both," giving the impression that the Employer did consider alternative requirements even though they were not listed on the ETA 750 Part A. The CO found 73 of the 76 U.S. applicants to be qualified based on a combination of their education, training, and experience to perform the basic duties described.

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Accordingly, the Employer was notified that it had until October 6, 1992, to rebut the findings or to cure the defects noted.

In its rebuttal, dated October 6, 1992 (AF 15-29), the Employer contended that the requirement for the M.S.,

. . . is absolutely mandatory. No alternative education or experience can qualify since the course work in the masters program is unique and not offered in an undergraduate program. It also cannot be substituted by experience especially since we require knowledge of the computerized 'critical path method' of construction scheduling.

The Employer stated that the prerequisite for admission in the Masters Program is a B.S. in Civil Engineering or the equivalent. The Employer also contended that the NOF incorrectly identifies the offered position as a Construction Superintendent, when in fact the position is for a Construction Management Engineer, with only 25 percent supervision time. The Employer further asserted that the July 22, 1992, letter stated erroneously that the U.S. applicants lacked the required experience since none was required.

The CO issued the Final Determination on November 24, 1992 (AF 10-14), denying certification because the Employer remains in violation of the regulations at 20 C.F.R. Part 656. The CO determined that the Employer's insistence that there is no alternative to the Masters Degree in Construction Engineering Management requirement proves the CO's finding that the requirement is narrow and unduly restrictive and, on this point alone, the application for alien labor certification must be denied. Additionally, the Employer's requirement for "a specific master's course work in construction engineering management and critical path method" was not before the CO when the application was accepted for processing -- information submitted after the filing of the application is directly contrary to the regulations at 20 C.F.R. § 656.21(g)(3) and, on this item alone, the application must be denied. Therefore, the Employer has failed to justify its actual minimum requirements pursuant to *Information Industries, Inc.*, 88-INA-82. Finally, the CO concluded that the Employer rejected U.S. workers for undisclosed requirements, and thus, for non-job-related reasons, and that on this point alone, the labor certification application must be denied.

On December 28, 1992, the Employer requested review of the Denial of Labor Certification (AF 1-9). The CO, in February 1995, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

### **Issues**

The issues in this case are whether the Employer has stated the actual minimum requirements, whether the requirement of a Masters Degree in Construction Management is unduly restrictive, and whether the Employer rejected U.S. workers for other than lawful, job-related reasons.

## Discussion

Section 656.21(b)(5) requires that the employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and that the employer has not hired workers with less training or experience for jobs similar or that it is not feasible to hire workers with less training or experience than that required in the employer's job offer. Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruiting process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*).

A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the U.S. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*); *Duarte Gallery, Inc.*, 88-INA-92 (Oct. 11, 1989). Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the Dictionary of Occupational Titles, or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish business necessity for the requirement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show:

- (1) That the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and,
- (2) That the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

In this case, the CO concluded that the Employer's requirement of a Masters Degree in Construction Management Engineering was unduly restrictive for the position of Construction Superintendent. The Employer argues that the position is that of Construction Management Engineer. The DOT does not contain a job title of Construction Management Engineer. The position of Construction Superintendent is defined as:

Directs activities of workers concerned with construction of buildings, . . . or other construction projects: Studies specifications to plan procedures for construction on basis of starting and completion times and staffing requirements for each phase of construction . . . . Assembles members of organization (supervisory, clerical, engineering and other workers) at start of project. Orders procurement of tools and materials to be delivered at specified times to conform with work schedules. Confers with and directs supervisory personnel and subcontractors engaged in planning and executing work procedures, interpreting specifications, and coordinating various phases of construction to prevent delays. Confers with supervisory personnel and labor representatives to resolve

complaints and grievances within the work force. Confers with supervisory and engineering personnel and inspectors and suppliers of tools and materials to resolve construction problems and improve construction methods. Inspects work in progress to ensure that work conforms to specifications and that construction schedules are adhered to. Prepares, or receives from subordinates, reports on progress, materials used and costs, and adjusts work schedules as indicated by reports. May direct workers concerned with major maintenance or reconditioning projects for existing installations. Workers are usually designated according to type of project, work or construction activity directed.

*Dictionary of Occupational Titles* at 124.

The duties described by the DOT position of Construction Superintendent and the duties described by the Employer's application for Construction Management Engineer are essentially similar. The one difference involves the Employer's duty of "[d]evelop and implement Critical Path Method (CPM) for scheduling of construction phases" (AF 53). While the DOT description may not be as specific in this area, it does contain a number of entries for duties involving the scheduling and coordinating of manpower and materials for the various phases of construction.

The position of Construction Superintendent has an SVP (Specific Vocational Preparation) of 7, which equates to training of over two years and up to and including four years. Specific Vocational Preparation includes " . . . that part of college training which is organized around a specific vocational objective." *Dictionary of Occupational Titles* at 1009. When assessing Specific Vocational Preparation, a year of college level instruction may be regarded as a half-year of vocational experience. See *A-Transmission Discount, supra*. Under these standards, the requirement of a Masters Degree is within the SVP of the position of Construction Superintendent. This evidence, however, only shows that *a masters degree* can be normally required for the position, which the CO has admitted (AF 31).

The CO has found the requirement of a specific Masters Degree in Construction Management "too narrow and thus restrictive . . . [b]ecause the employer has not considered any alternatives and/or related occupations . . ." (AF 31). The Employer has stated in rebuttal that it has considered and rejected alternatives because "[n]o alternative education or experience can qualify since the course work in the masters program is unique and not offered in an undergraduate program" (AF 27). The Employer also includes an outline of the Masters of Science in Civil Engineering, Construction Engineering and Management course work from the University of Southern California (AF 29). In the request for review, the Employer states that "[t]he areas of architecture, electrical, industrial and mechanical engineering are not related as suggested by the Notice of Findings" (AF 1). The Employer includes a December 23, 1992, letter, from Mirhan Agbabian, Chairman of the USC School of Engineering, which states that the Construction Engineering and Management program is only offered at a graduate level, he knows of very few schools that offer such a program at the undergraduate level, and as part of the Masters program curriculum, scheduling and budgeting procedures such as the critical path method (CPM) are offered (AF 3).

All of the Employer's statements in rebuttal and in the request for review reiterate the Employer's position, but they do not establish why alternative degrees or experience could not perform the job duties for this position. The business necessity for a particular educational degree is not established where the employer fails to establish why an employee holding a similar degree could not perform the job duties. *Atlantic Sales, Inc.*, 88-INA-349 (May 24, 1989) (*en banc*). The USC curriculum and Chairman Agbabian's letter reinforce what is contained in USC's program, but do not address why any other educational backgrounds or experiences would be unable to perform the job duties required of this position, nor do they document the business necessity for the requirement of the specific Masters Degree in Construction Management Engineering. Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 90-INA-387 (July 30, 1991). None of the Employer's evidence documents the number of employees who possess such a degree, the employees who have held the position in the past who have possessed such a degree, or show the requirement to be a norm in the construction industry in general. See *ARCO Oil & Gas Company*, 89-INA-295 (May 22, 1991). Business necessity for a restrictive degree requirement is not established where the employer fails to provide supporting documentation. *John Hancock Financial Services*, 91-INA-131 (June 14, 1992).

The Employer also contends that the reason the specific degree is required is that "the course work could not be substituted by experience, especially the [computerized] Critical Path Method [of construction scheduling]," and that "CPM is a commonly used and accepted method and is universally utilized in the construction industry" (AF 1). The CO contends that the Employer did not offer CPM as a requirement until rebuttal, in violation of 20 C.F.R. § 656.21(g) (3) (AF 13). The CO is correct in that the Employer's application lists "[d]evelop and implement Critical Path Method (CPM) for scheduling of construction phases," as a job duty and not as a job requirement (AF 53). Even if CPM were listed as a job requirement, the Employer's statements and those of Chairman Agbabian would not be sufficient documentation to establish the business necessity of CPM. See *ARCO Oil & Gas Company*, *supra*; *John Hancock Financial Services*, *supra*.

As it is clear that the Employer has failed to provide adequate documentation of the business necessity for the requirement of a Masters Degree in Construction Engineering Management, the CO properly denied certification on that ground. Accordingly, the CO also properly denied certification for the Employer's rejection of U.S. workers solely for not having that specific degree.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the \_\_\_\_\_ day of August, 2002, for the Panel:

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Richard E. Huddleston

Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002.*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.